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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CALVIN JAMES CALVIN, Defendant and Appellant.	G048597 (Super. Ct. No. 10HF0179) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed as modified.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Calvin James Calvin was convicted of multiple counts of grand theft and of using an untrue statement in the sale of a security. The trial court sentenced him to a total of 11 years in prison. Defendant raises two arguments challenging his conviction.

First, defendant argues there was insufficient evidence to support his conviction for one of the grand theft charges. Having reviewed the record in the light most favorable to the judgment, we conclude there was sufficient evidence to support the conviction on that charge.

Second, defendant argues the trial court erred by failing to provide a unanimity instruction. We disagree. A unanimity instruction is not needed where, as here, the evidence shows defendant might have used one or more misrepresentations to perpetrate each individual crime.

Therefore, we affirm the judgment. However, as explained *post*, the abstract of judgment must be amended to correctly reflect the crime of which defendant was convicted, and the trial court's dismissal of a sentencing enhancement.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

William Wooldridge, Jr. (Counts 1 & 2)

Defendant represented to William Wooldridge, Jr., that defendant was going to pool money from multiple investors to invest in blue-chip stocks. Defendant told Wooldridge he could expect a return of 12 to 18 percent on his investment, and ultimately his investment would be doubled. Defendant never told Wooldridge that he had previously been convicted of fraud; if Wooldridge had known this information, he would not have given defendant money to invest.

Wooldridge invested $28,500 with defendant by sending him three separate checks between December 2005 and July 2006. Wooldridge never received a prospectus

or other paperwork explaining what investments had been made. Defendant sent Wooldridge a list of investments in companies, which companies were later determined not to exist. Wooldridge never got any of his $28,500 back.

Ciria Rossy (Counts 3 & 4)

Wooldridge's wife suggested that Ciria Rossy invest with defendant. Defendant told Rossy that he had "retirement investment[s]." Defendant represented to Rossy that she would make at least $5,000 on a $40,000 investment within six months, and her money would be safe. Rossy invested a total of $41,000 with Calvin & Associates in February and April 2006. Defendant told Rossy that if she left her money with him longer, she would get even more back, and her investment would increase by "[f]ive percent, ten percent, twenty percent and thirty percent." Defendant continued to assure Rossy, "everything was fine. The money was fine."

Six months later, Rossy called defendant to ask where her money was, but could not reach him. Rossy received a check from defendant on November 14, 2009, for $100. Rossy never got the rest of her money back. Rossy later learned that defendant had previously been convicted of felony grand theft. Had she known about defendant's earlier conviction, she would not have given him money to invest on her behalf. Rossy testified defendant never told her he would use her money for his personal expenses.

Clarice Murray (Counts 5 & 6)

Clarice Murray wanted to invest some money, and obtained defendant's telephone number from Wooldridge. Defendant told Murray that she would earn $10,000 on a $40,000 investment. Murray advised defendant she would need her money returned by August or September 2006, and defendant represented he would return the money by then. Defendant told Murray her money would be safe, and promised she would get her money back. Murray sent defendant four checks totaling $41,000 between February and April 2006. Defendant continued to assure Murray that "there wouldn't be a problem"

getting her money back. Murray never got any of her investment money back. Murray testified she would not have given defendant money to invest if she had known he had previously been convicted of felony grand theft. Murray also testified that defendant never told her he would use her investment money to pay his personal expenses.

Cynthia Blake-Wardlow (Counts 7 & 8)

Cynthia Blake-Wardlow met defendant through Rossy and Murray. Defendant told Blake-Wardlow, "[y]ou can trust me. I'm a man of God. You can trust me." In February 2006, Blake-Wardlow took out a home equity loan in order to invest through defendant. Blake-Wardlow wrote defendant a check for $30,000 on February 5, 2006. Blake-Wardlow understood that the money would be invested by defendant in ventures and Blake-Wardlow would make a decent return on her investment. Defendant did not tell Blake-Wardlow he had previously been convicted of felony grand theft, or that he would spend her money on his personal expenses. Had Blake-Wardlow been aware of these facts, she would not have given money to defendant.

Several months later, Blake-Wardlow, Murray, and Rossy met with defendant at a restaurant in Newport Beach; at that time, defendant told them their money was safe, and he was in an unfortunate dispute with the government that was tying up the assets. Blake-Wardlow did not receive any of her money back.

Michael Allen (Count 9)

Michael Allen owned a business he wished to take public, but needed accredited investors to do so. In 2009, defendant called Allen to discuss investing in Allen's business. Defendant represented he was a "dealer-broker," and he could immediately begin shopping Allen's company to accredited investors. Allen gave defendant $7,000 as an engagement fee to cover transactional costs associated with gathering investors and providing them information regarding Allen's business. Defendant was obligated to immediately begin contacting accredited investors, and

prepare reports detailing those contacts to comply with the requirements of the Securities and Exchange Commission. Defendant promised to raise $5 million from accredited investors.

One month after providing the money to defendant, Allen's company terminated any relationship with defendant based on defendant's failure to perform. Allen's $7,000 payment was never returned. Allen testified that he was not aware of defendant's previous convictions for felony grand theft; if Allen had been, he "absolutely" would not have given money to defendant.

Brandon Checketts (Count 10)

Brandon Checketts was seeking to purchase a cabinet business in Salt Lake City. After numerous telephone conversations and e-mails, Checketts and defendant entered into an agreement by which investors defendant located would own 30 percent of Checketts's cabinet business, and defendant would own 5 percent. Checketts was required to tender $25,000 to defendant to cover costs and attorney fees, and to help defendant generate the capital.

On March 6, 2008, Checketts wired defendant $5,000. Checketts did not receive any part of that investment back. A relative of Checketts wired the additional $20,000 to defendant. That relative never received his money back from defendant.

Defendant never told Checketts his investment money would be used to pay defendant's personal expenses. Defendant also failed to tell Checketts about his previous conviction for grand theft. Had Checketts been aware of these facts, he would not have given his money to defendant.

Robert Watson (Count 12)

Robert Watson received a cold call from defendant asking if Watson wanted to invest in an initial public offering for a small, privately owned company. Defendant represented he was the chief financial officer of that company, CTR Alarms

(CTR), and stated he had previous involvement with a number of large companies, including Microsoft. Watson's investment would be in a private offering for CTR, to improve its systems before it went public. Watson caused $25,000 to be wired from his IRA account to defendant on December 13, 2008. On December 30, 2008, defendant sent Watson a "dividend payment" of $100. Watson never received any other money back from defendant.

In February 2009, Watson contacted George Palefsky, the president of CTR, who advised Watson that CTR was a privately held company of which Palefsky was the sole shareholder. Palefsky also advised Watson that he had briefly spoken with defendant about going public, but had never pursued the matter. Palefsky made clear to Watson that defendant was not CTR's chief financial officer. Watson contacted defendant and demanded the return of his money. Watson later learned that defendant had previously been convicted of felony grand theft. Watson testified that if defendant had disclosed his prior conviction, he would not have invested his money through defendant.

Forensic Accountant Testimony

A forensic accountant audited defendant's business accounts, including an E*Trade account into which the investors' money had been deposited. The accountant determined that $201,559 had been collected by defendant from the investors, and about $3,000 had been repaid. At least $161,736 had been paid from the account by check or wire transfer for defendant's personal expenses. Those expenses included child care costs, payments to defendant's mother and children, dry cleaning bills, shoe repairs, smog checks for defendant's car, department store charges, and medical expenses.

Generally, only about $2,000 of the money in defendant's E*Trade account was tied up in actual investments at any time. At one point, about $43,000 from defendant's accounts was actually invested in stocks. That amount included a $42,000

investment in a company called Pacific Ethanol; defendant ultimately liquidated that investment and used the money for his personal expenses.

Additional Evidence

In 2003, defendant was convicted of four counts of grand theft, and sentenced by the Riverside County Superior Court to five years in prison. Defendant's conviction was affirmed. (*People v. Calvin* (Nov. 10, 2004, E033755) [nonpub. opn.].)

At trial in this case, defendant testified the money he had received from the victims was an investment in his company, Calvin & Associates, Inc., making them stockholders in Calvin & Associates; it was not money he was supposed to invest for them in other companies.

Procedural History

Defendant was charged in an information with nine counts of grand theft (Pen. Code, § 487, subd. (a) [counts 1, 3, 5, 7, and 9-13]), and four counts of using an untrue statement in the purchase or sale of a security (Corp. Code, former § 25401[1] [counts 2, 4, 6, and 8]). As to all counts, the information alleged defendant had committed the crime of theft in an amount exceeding $100,000. (Pen. Code, § 1203.045, subd. (a).) The information also alleged, as to counts 1 through 8, a sentencing enhancement pursuant to Penal Code former section 12022.6, subdivision (a)(2), that the total value of the property taken by defendant was in excess of $150,000. Finally, the information alleged defendant had a prior conviction for violating Penal Code section 487, subdivision (a). (Pen. Code, § 667.5, subd. (b).)

[1] Effective January 1, 2016, the language of Corporations Code section 25401 was amended. (Stats. 2015, ch. 190, § 19.) The amendment does not affect the issues raised by this appeal.

During trial, the court granted defendant's motion to dismiss the case as to two of the grand theft counts (counts 11 and 13), but denied it as to all other counts. The jury convicted defendant of all other charges, and made true findings on all allegations.

At the sentencing hearing, in response to defendant's motion for a new trial, the trial court initially dismissed the Penal Code section 12022.6, subdivision (a)(2) enhancement because it was not supported by sufficient evidence. The court then sentenced defendant to a total of 11 years. After an unreported bench conference, the court vacated the order dismissing the section 12022.6, subdivision (a)(2) sentencing enhancement, and revised defendant's sentence to a 13-year term. Sometime later, the trial court entered a minute order (1) correcting the restitution owed by defendant to Wooldridge; (2) granting defendant's motion for a new trial as to the Penal Code section 12022.6, subdivision (a)(2) enhancement, dismissing that enhancement, ordering that defendant's total term of imprisonment was 11 years, and ordering that the judgment entered at the sentencing hearing would remain in effect in all other respects; and (3) ordering that an amended abstract of judgment be prepared. Defendant filed a timely notice of appeal.

DISCUSSION

I.

SUFFICIENCY OF EVIDENCE OF GRAND THEFT AS TO VICTIM ALLEN

Defendant argues there was not sufficient evidence to support the jury's verdict of guilt on count 9, for grand theft as to victim Allen. "'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be

deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if "'upon no hypothesis whatever is there sufficient substantial evidence to support'" the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The basis of the grand theft charge involving Allen was that defendant and Allen entered into an agreement under the terms of which defendant would perform certain activities on Allen's behalf, in exchange for $7,000. Defendant argues that because he did some of the anticipated work, for which he was entitled to compensation, he could not be convicted of grand theft.

Theft includes "knowingly and designedly, by any false or fraudulent representation or pretense, defraud[ing] any other person of money." (Pen. Code, § 484, subd. (a).) At the time defendant received the $7,000 from Allen, grand theft was committed when the money taken exceeded $400. (Pen. Code, former § 487, subd. (a).)[2]

Allen testified that defendant's performance under the contract was "zero." Allen never got any of his money back, despite making written demands. The evidence was sufficient to support the jury's guilty verdict on count 9.

II.

UNANIMITY INSTRUCTION

Defendant argues the trial court should have given the jury a unanimity instruction with respect to the four counts of making untrue statements relating to the purchase or sale of a security under Corporations Code former section 25401—counts 2, 4, 6, and 8.

To prove a violation of Corporations Code former section 25401, the prosecution must prove the defendant willfully sold or offered to sell a security, through a

[2] Effective January 1, 2011, the amount was increased to $950. (Stats. 2010, ch. 693, § 1; Stats. 2010, ch. 694, § 1.5.)

written or oral communication, and (1) the communication included an untrue statement of material fact the defendant knew was false at the time he or she made the statement, or (2) the communication was misleading because the defendant failed to state a fact he or she knew or should have known was material. (Corp. Code, former § 25401, subd. (b); *People v. Simon* (1995) 9 Cal.4th 493, 522.) The prosecutor in this case argued to the jury that defendant made multiple misrepresentations to the victims of counts 2, 4, 6, and 8 when selling securities to them, including defendant's assertion he would invest the victims' money, when he had no intention of doing so, his assertion the investments would generate large returns, and the failure to tell the victims about his previous conviction for felony grand theft or his lack of a license to sell securities in the State of California. However, with respect to each count, defendant was charged with only making one sale of a security to one victim at one time.

Although defendant might have violated Corporations Code former section 25401 by making one or more misrepresentations to each victim, as explained in *People v. Butler* (2012) 212 Cal.App.4th 404, 426, a unanimity instruction was not required: "When the evidence 'shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the "theory" whereby the defendant is guilty.' [Citation.] [¶] Here, the court did not err in failing to provide a unanimity instruction. Each of the [Corporations Code] section 25401 counts at issue on appeal alleged defendant sold one security on a specific date to a single victim. The jurors were not required to agree on the particular misrepresentations or omissions they relied on for the convictions because that finding merely relates to the manner of committing the crime." Accordingly, we find no error in the trial court's instructions to the jury.

III.

CORRECTIONS TO THE ABSTRACT OF JUDGMENT

The abstract of judgment does not reflect that the trial court dismissed the Penal Code section 12022.6, subdivision (a)(2) sentencing enhancement, and therefore reflects an incorrect total sentence for defendant. Further, the abstract of judgment states that in count 9, defendant was convicted of Corporations Code section 25541, when he was in fact convicted of Penal Code section 487, subdivision (a) in that count. We direct the trial court to make those corrections.

DISPOSITION

We direct the trial court to amend the abstract of judgment to reflect (1) that the sentencing enhancement under Penal Code section 12022.6 was dismissed, and (2) the correct crime of which defendant was convicted in count 9, namely, Penal Code section 487, subdivision (a), and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.